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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 864 46

RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF APPELLANT IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION

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STATUTES

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RICHFIELD OIL CORPORATION, A CORPORATION,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee

BRIEF OF APPELLANT IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION

The Appellee has filed a statement opposing the jurisdiction of this Court upon three grounds:

(1) That the judgment of the Supreme Court of the State of California is not final within the meaning of Section 237 of the Judicial Code.

(2) That the case does not involve the federal constitutional validity of a state statute.

(3) The federal question involved is unsubstantial.

While we cannot believe that there is merit in either Appellee's second or third points or that it suggests them

with any serious expectation of their being accepted, the first point presents a very close technical question. Since we desire to reply to that, we shall also briefly answer the Appellee's second and third points.

I

The Judgment of the Supreme Court of the State of California Should Be Held To Be a Final Judgment Within the Meaning of Section 237 of the Judicial Code.

The question as to the finality of the judgment appealed from arises from the fact that it reversed the judgment of the Superior Court without directions. Under California practice that ordinarily requires a retrial.

While for some time the text writers have expressed a doubt as to whether this Court in determining the finality of the judgment of a state court could look beyond the face of that judgment, we interpret the recent decision of *Department of Banking* v. *Pink*, 317 U. S. 264, 268, as a decision that this Court can look at the entire record.

On the entire record the judgment appealed from, we believe, has all the attributes of finality and so conclusively disposes of the federal question involved, which, incidentally, was the only issue litigated in either the Superior or Supreme Court, that we believe under the decision in *Metropolitan Water Company* v. *Kaw Valley Drainage District*, 223 U. S. 519, 523, the judgment of the California Supreme Court should be regarded as one tantamount to a reversal with directions to enter judgment for defendant, and hence final within the purview of Section 237 of the Judicial Code.

There are a great number of decisions of this Court as to what constitutes a final judgment within the meaning of Section 237 of the Judicial Code. We do not believe it

would serve any useful purpose to comment on many of them. They establish two clearcut rules:

(1) The judgment of a state court is not final within the meaning of Section 237 where there is further judicial action to be taken.

(2) Such judgment is final within the meaning of the Section even though the matter is not disposed of, where the further acts are merely ministerial.

The two rules are thus clearly stated in the fairly early case of *Mower* v. *Fletcher*, 114 U. S. 127, 128. There, in denying motions to dismiss appeals from judgments of the Supreme Court of California reversing the judgments of the Superior Court for defendants, with directions to enter judgments as prayed by the complainants, this Court, speaking through the Chief Justice, said:

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court which has been rendered into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are not

final, because something yet remains to be done to complete the litigation."

Mower v. *Fletcher*, 114 U. S. 127, 128.

See, also, to the same effect:

Radio Station WOW, Inc. v. *Johnson* (not yet officially reported), 65 S. C. 1457, 89 L. Ed. 1397.

On page 2 of its Statement Opposing Jurisdiction [1] Appellee states that under the practice in California the Appellant, with permission of the court, could amend its complaint and introduce further and other evidence to support its contention. *This, we believe, is incorrect.*

There is no question that Appellee states the general rule of practice in this state, but under the statutes of this state governing this action the rule is not applicable.

As shown by our Statement as to Jurisdiction,[2] the complaint alleged and the answer admitted (Tr. 11, 27-28) that the oil was delivered to the New Zealand Government Tanker R. F. A. "Nucula" at the marine terminal at Long Beach, California, and that a bill of lading was executed by the Master of the "Nucula" designating the Appellant as shipper and consigning the oil for delivery to the Naval Officer-in-Charge at Auckland, New Zealand, and that the Appellant duly executed and filed a Shipper's Export Declaration.

As to the foregoing facts there was no issue and no evidence offered and none could be since they were established by the verified pleadings of the parties. Obviously as a practical matter they cannot be changed or modified.

Regardless of all practical considerations, under the Retail Sales Act of California governing suits for refund, it would not be permissible for Appellant either to amend its Complaint or prove other facts, since under the provi-

[1] Hereafter referred to as "Objections."

[2] Hereafter for brevity referred to as "our statement."

sions of the Act it is completely bound by its claim for refund.

Under Section 31 of the California Retail Sales Tax Act, in order to sue for the tax the taxpayer is required to file a claim for refund within ninety days, setting forth the grounds on which it is entitled to refund, and it can base a recovery of the tax on no other grounds than those stated.[3]

The claim made by Appellant on the Appellee is attached to and made a part of the Complaint as Exhibit "B" (Tr. 19). It succinctly sets forth the transaction, the call for bids in New Zealand by the New Zealand Government; the acceptance of the bid of Appellant's predecessor; that the contract of sale provided for the delivery of the oil to a New Zealand Tanker f. o. b. Los Angeles (Tr. 23); that pursuant to the agreement the Appellant delivered the oil

[3] The applicable portions of Section 31 of the California Retail Sales Tax Act in force at the time of the filing of the claim for refund and institution of the suit, read:

"No injunction—payment under protest—action to recover.—No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection under this act of any tax sought to be collected and no suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed as provided in section 23 hereof.

Within ninety days after the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board *on the grounds set forth in such claim in a court of competent jurisdiction* in the county of Sacramento for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed.

If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. *Failure to bring suit or action within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.*" (Italics are ours.)

More California Retail Sales Tax Act, Sec. 31.

to the New Zealand Tanker "Nucula" at Long Beach, California, and that such fuel oil was exported to Auckland under an Export Declaration filed by Appellant (Tr. 23).

Hence it is apparent that under the statute no grounds of recovery other than those set out in the claim could be advanced by Appellant or considered by the Superior Court on a retrial. The Supreme Court of California in the judgment appealed from has held that the Appellant is not entitled to recover on the ground set forth in its claim for refund. This determination is binding upon both the Superior Court and the Supreme Court of California, neither of which, under the law of California, may hereafter reconsider it.

> "The rule of the law of the case may be succinctly stated as the rule requiring both trial and appellate courts to follow the rules laid down upon a former appeal *whether such rules are right or wrong.*" (Italics are ours.).
>
> Estate of Baird, 193 Cal. 225, 234, 223 Pac. 974, 978.

See, also, to the same effect:

Coats v. *General Motors Corporation*, 11 Cal. (2d) 601, 607, 81 Pac. (2d) 906, 909;

Steelduct Co. v. *Henger-Seltzer Co.* (Not yet officially reported), 26 A. C. 640, 647, 160 Pac. (2d) 804, 808;

Davis v. *Edmonds*, 218 Cal. 355, 358-9, 23 Pac. (2d) 289, 290;

Clayton v. *Schultz*, 18 Cal. (2d) 328, 332-3, 115 Pac. (2d) 446-8.

We submit that the judgment appealed from should be treated as tantamount to a reversal with directions to enter judgment for the defendant.

In *Metropolitan Water Company* v. *Kaw Valley Drainage District*, *supra*, 223 U. S. 519, 523, 56 L. Ed. 533, 535, the appellant, a Kentucky corporation, owned lands in the State

of West Virginia which the appellee sought to acquire for public use. Under the statutes of the state, the appellee petitioned the District Judge to appoint a commission to value the property. The appellant filed a petition to remove the case to the United States Circuit Court, which was denied. Appellant then filed in the United States Circuit Court its bill in aid of a removal. Demurrer was interposed and overruled and a temporary restraining order issued which was reversed by the Circuit Court of Appeal, which remanded the case with directions to proceed in accord with the opinion.[4] On the return of the remittitur, the demurrer was sustained and the bill dismissed and an appeal allowed to this Court, the Circuit Court certifying that it dismissed the bill solely on the ground of want of jurisdiction. The appeal was dismissed on the ground that the judgment of the Circuit Court of Appeals was the final determination of the question Appellant sought to have reviewed and that a petition for certiorari should have been filed to review its decision, this Court saying, in part:

Drainage District, 223 U. S. 519, 523, 56 L. Ed. 533, 535.

> "We need not consider when a writ of certiorari may issue to review decisions on interlocutory orders by the circuit court of appeals, for, in any event, its judgment in the present case must be treated as equivalent to a direction to enter a final decree against the complainant for want of jurisdiction. It is true that the mandate did not in terms make such an order, yet its direction that the circuit court 'should proceed in accordance with the opinion' operated to make the opinion a part of the mandate as completely as though it had been set out at length. Under such a mandate nothing was left for the circuit court to do except to dismiss the bill."

Metropolitan Water Company v. *Kaw Valley*

[4] This direction is identical with the effect of a general reversal in California under the doctrine of the "law of the case."

It seems to us that in reason this case should fall within that rule.

We do not believe that any of the cases cited by the Appellant are in conflict with these views. All three simply announce the general rule that a reversal without direction usually places the case at large, but they all recognize the rule that both the Superior and Appellate Courts are bound by the law of the case. Thus, in *Monson* v. *Fischer*, 219 Cal. 290, 291, 26 Pac. (2d) 6, it is stated:

> "The reversal of the judgment sets the case completely at large *except as restricted by the opinion of the appellate court.*" (Italics are ours.)
>
> *Monson* v. *Fischer*, 219 Cal. 290, 291, 26 Pac. (2d) 6.

None of the cases deals with the situation of the instant case, where under the statute governing the right of action there can be no change or deviation from the grounds of recovery set forth in the claim for refund, by which the Appellant is bound and which the Supreme Court has finally held does not constitute a ground for recovery.

In the recent case of *Department of Banking* v. *Pink*, 317 U. S. 264, 268, 87 L. Ed. 254, 257, this Court said:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether *under local rules of practice the judgment is denominated final* (*Wick v. Superior Ct.* 278 U. S. 575, 73 L. Ed. 515, 49 S. Ct. 94; *Cheltenham & A. Sewerage Co. v. Pennsylvania Pub. Utility Commission*, No. 160, decided October 12, 1942, 317 U. S. 588, post 482, 63 S. Ct. 38), *but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court* (see *Gorman v. Washington University*, 316 U. S. 98, 86 L. Ed. 1300, 62 S. Ct. 962). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to

limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established." (Italics ours.)

Department of Banking v. *Pink*, 317 U. S. 264, 268, 87 L. Ed. 254, 257.

Again, in *Cole* v. *Violette*, 319 U. S. 581, 582, 87 L. Ed. 1599, 1600, this Court said:

"But in determining what is a final judgment or decree within the meaning of Section 237 of the Judicial Code, 28 USCA Sec. 844, 8 FCA Title 28, *Sec. 344, we are not controlled by the designation* applied to it in state practice." (Italics ours.)

Cole v. *Violette*, 319 U. S. 581, 582, 87 L. Ed. 1599, 1600.

Since Appellant is barred by Section 31 of the California Retail Sales Tax Act from asserting on the retrial of the case in the Superior Court any grounds of recovery other than those contained in its Claim for Refund, and since the California Supreme Court has conclusively for all purposes determined that Appellant cannot recover on the Claim for Refund here in litigation, we respectfully submit that the judgment appealed from is final under the foregoing decisions.

II

The Appeal Squarely Presents the Question as to Whether the California Sales Tax Act of 1933, as Amended by the Statutes of 1935, as Construed, Applied and Enforced, is Repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States.

It is true that the California Sales Tax Act contains the exemption set out in the Objections. The exemption, however, is without practical value. The Constitution, as the supreme law of the land, exempts any transactions from the operation of the act upon which it forbids the levying of

a tax. The statute imposes a tax upon all retail sales within this state upon which a tax is not forbidden by either the Federal or State Constitution. To determine whether or not the transaction was exempted by the provisions of the statute, the California Supreme Court necessarily had to determine whether or not the tax was prohibited by the Federal Constitution. That, of course, is a federal question. In sustaining the tax the Supreme Court of California necessarily held that the Appellee had properly construed, applied and enforced the statute of this state, and that so construed, applied and enforced the statute did not violate the Federal Constitution.

On this point, we do not believe this appeal can be distinguished from *Standard Oil Co.* v. *Johnson*, 316 U. S. 481.

That action was to recover gasoline taxes exacted by the State of California upon gasoline sold to United States Army Post Exchanges in California. The act contained a provision expressly exempting motor vehicle fuel sold to the Government of the United States. The dispute was whether sales to the United States Post Exchanges were sales to the Government. The taxes were paid under protest and an action brought to recover them upon the ground (1) that the sales to the Exchanges were exempt from tax; (2) that if construed and applied to require payment of the tax, the act would impose a burden upon instrumentalities or agencies of the United States in contravention of the Federal Constitution. Judgment being rendered in the Superior Court for the defendant and affirmed on appeal, this Court said:

> "Since validity of the State statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here on appeal under Section 237(a) of the Judicial Code, 28 USCA, Section 344(a)."
>
> *Standard Oil* v. *Johnson*, 316 U. S. 481, 483.

In the instant case, the Appellant sought the recovery of the tax upon precisely the same grounds upon which the Standard Oil Company sought the recovery of taxes it had paid on sales to service stations, viz.:

(1) Under the provisions of the act the sale was exempt.

(2) If the act were applied, construed and enforced so as to require a tax, it was in contravention of Article I, Section 10, Clause 2 of the Constitution of the United States.

In its Objections, Appellee said:

> "A tax statute cannot be contrary to the Constitution when it specifically exempts from the measure of the tax those receipts from sales which the State is forbidden to tax by the Constitution". (Objections, p. 4).

The answer is that the unconstitutionality of the statute is in its application, construction and enforcement.

It would indeed be a strange anomaly if a state could avoid having the validity of one of its statutes under the Federal Constitution determined by this Court by placing in such statute such a general exemption, and then through its officers and courts applying, construing and enforcing the statute so as to ignore the exemption and to impose taxes or other obligations upon its citizens that were clearly prohibited by the Constitution.

A substantially similar contention to the one here urged by Appellee was rejected in *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 270. The action was instituted by a bill in equity in the state court to enjoin the enforcement of a statute prohibiting anyone from transporting oil by pipe line without paying two cents per barrel. It was charged that if the statute was construed as to impose a tax upon oil moving in interstate commerce it was unconstitutional. The lower court sustained the bill, but the

Supreme Court of the State reversed the decree on the ground that the oil sought to be excluded from taxation was moves in intra- and not interstate commerce. In denying a motion to dismiss an appeal from that judgment, this Court said, speaking through Justice Holmes:

> "But as the court declared that the act should be construed to apply only to commerce within the state, it is urged that there is no jurisdiction here of the writ of error because there is no question as to the validity of a statute so limited. The plaintiff in error also applied for a writ of certiorari, so that the objection would be immaterial were we required to determine upon which proceeding the decree should issue. In view of that necessity we dispose of the matter before going further. Upon the declaration of the court we may conjecture that if it had considered that the oil in question moved in interstate commerce, it would have agreed with the court below, and on this ground it is argued that the mistake, if any, was not in approving the statute, but in the court's conception of interstate commerce. *But we must look at what the court has done, not at its mode of reaching the result.* What it has done is to decide that the statute covers all the oil produced in West Virginia, and that it shall be upheld in so doing. *The nature of the mistake that induced the act is immaterial.* A case would not be withdrawn from the jurisdiction of this court in error by a declaration that a statute was addressed only to intrastate commerce if it was applied wholesale to freight passing across the continent. The fact that the error was less does not affect the principle involved. But, furthermore, the court only confined the statute to intrastate commerce 'as above defined'; that is, to commerce that embraced what the plaintiff carried on." (Italics ours.)
>
> *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 270, 271.

"'Where a federal right is concerned, we are not bound by the characterization given to a state tax by

state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' *Carpenter* v. *Shaw*, 280 U. S. 363, 367, 368, 74 L. Ed. 478, 482, 50 S. Ct. 121."

United States v. *County of Allegheny*, 322 U. S. 174, 184.

We are unable to understand the assertion of the Appellee on page 3 of its Objections to the effect that while the validity of the statute was formally challenged by the pleadings, the point was not pressed in the Supreme Court or its validity referred to in the briefs or in the opinion of the Superior or Supreme Court.

No other question was discussed in either court.

An examination of the opinion of the trial court found in the Transcript shows that that was the only question which it considered. Thus, at the outset of the Opinion, it is stated:

"The Plaintiff claims that this was an export sale exempted from tax or impost by the Constitution of the United States. Defendant contends that as the oil was delivered to the purchaser at the port of Long Beach, in California, that the sale was a local sale, consummated in this State and subject to local law" (Transcript, p. 53).

An examination of both the majority and minority opinions of the California Supreme Court in both its first and second decisions will show that no other question was considered or discussed. The Conclusion of Appellant's (respondent below) Brief in the California Supreme Court reads as follows:

"* * * We submit that it is apparent from the entire act as well as from the specific exemption of Section 5 that it was never intended that the Act should be applicable to such a transaction. *It is equally clear*

that if so applied, the Act, so construed, would be in contravention of the Federal Constitution.

"We very respectfully, but very confidently submit that the tax levied by the appellant Board was invalid both because it was exempted from the Sales Act and was clearly forbidden by the Federal Constitution. We submit that on each of these grounds, the judgment appealed from must be affirmed." (Emphasis supplied.)

It is quite true that the opinions of the Supreme Court do not use the formal phrase to the effect that the statute was "applied, construed and enforced," employed in the pleadings and in our Brief. The Opinions do show that the only question considered was the validity of the tax under the Constitution. The observations of Justice Harlan in speaking for this Court in *Erie Railroad* v. *Purdy*, 185 U. S. 148, 154, are most pertinent:

"* * * Of course, if upon examining the record this court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed, in the trial court, then our jurisdiction would not have been defeated *by the mere failure of the highest court of the state to dispose of the question so raised, or to pass upon the right or immunity so claimed.*" (Italics ours.)

Erie Railroad v. *Purdy*, 185 U. S. 148, 154.

III

The Federal Question Involved Is Substantial

We cannot take seriously the Appellee's third point, that the federal question involved is not substantial. As to that point we are more than satisfied to stand on our Statement.

However, we may point out:

(1) That the seriousness of the federal question involved and the grave doubt of the correctness of the last decision of the Supreme Court of California are demonstrated by:

(a) The fact that the Superior Court reached the conclusion that the tax was one upon an export and hence prohibited by the Federal Constitution.

(b) The fact that the Supreme Court itself reached that conclusion in its first consideration of the case.

(c) The fact that its last and final decision is by division of the court.

We believe that a reading of the dissenting opinion of the Chief Justice, concurred in by Justice Edmonds, will convince anyone that if the majority opinion is not clearly erroneous, at least the correctness of its views is highly debatable.

(2) On page 5 of its Objections Appellee says: "* * * transactions of the character involved here are comparatively rare." It is difficult to reconcile this with Appellee's conclusion (pages 7 and 8 of Appellee's Objections):

> "California oil companies have sold petroleum products to various foreign purchasers. Excluding sales where the California vendor made delivery in its own tankers and excluding sales where delivery was made by common carrier, taxes aggregating more than $1,700,000 have been assessed on sales of this character by appellee."

Since the amount of the tax levy represents but three per cent of the total gross price, the amount involved would

indicate that the method of exportation disclosed in this case is a normal and ever recurring one.

Respectfully submitted,

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